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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-782

GATEWAY COAL COMPANY, *Petitioner,*
v.
UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit**

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Respondents submit that none of the four questions framed by petitioner is in fact at issue in this case. The Court of Appeals did not decide any of the four proffered questions adversely to petitioner, and had no occasion to express itself on the last two. The dispositive question of law, decided favorably to respondents below, is this:

Does the 1968 National Bituminous Coal Wage Agreement authorize work stoppages in the face of unsafe conditions at a coal mine?

COUNTERSTATEMENT OF THE CASE

This Counterstatement is needed in order to make clear what petitioner's bland account does not: That the work stoppage in the present case arose because of the gravest sort of dereliction of duty by supervisory personnel at the Gateway Mine; that the dereliction involved willful, indeed criminal, failure to carry out mine safety procedures required by law; that as a result, the lives of coal miners working at Gateway were put in jeopardy; that the walkout was undertaken as a specific protest against unsafe working conditions which were left uncorrected by petitioner and were honestly and reasonably regarded as intolerable by the men whose lives were at stake.

The Gateway Mine is extremely gassy, liberating a daily average of some 4,000,000 cubic feet of methane. (R. 16, 78.)¹ The mine is classified by the United States Bureau of Mines as "especially hazardous," requiring under the 1969 Federal Coal Mine Health and Safety Act, 30 U.S.C. § 813(i), special inspection procedures to insure the safety of the men who work there. (R. 80.) Because of the extremely gassy nature of the mine, a constant supply of air is necessary to draw off the large quantities of methane gas. If ventilation is inadequate or interrupted, the gas is permitted to accumulate and can explode from sparks caused by mechanized mining machines. (R. 68-69, 71, 80.)

No major explosion has occurred at the mine recently, but seven or eight minor explosions, called ignitions, had occurred at Gateway during 1970 and 1971. (R.

¹ Respondents will follow petitioner's citation practice—"App." refers to appendices to the Petition; "A." refers to the separately printed Appendix; and "R." refers to the appendix filed by Local 6330 in the Court of Appeals.

144.) In fact, the accumulations of gas became so serious that at least one portion of the mine was not mined for a period of time. (R. 161.) Aside from the instantaneous danger of fire and consequent burns, such ignitions pose a more substantial threat of injury if coal dust is put into suspension and then ignited causing a dust explosion. (R. 80.)

On the morning of April 15, 1971, as the night shift was finishing its work, the foremen at the Gateway Mine were to conduct a pre-shift examination as required by Section 303(d)(1) of the 1969 Coal Mine Health and Safety Act, 30 U.S.C. § 863(d)(1), which provides in relevant part:

“Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons . . . shall . . . test by means of an anemometer . . . to determine whether the air in each split is traveling its proper course and in normal volume and velocity. . . .”

The night shift foremen purportedly made the anemometer tests and made entries in the record book to the effect that air was flowing at the required level. (R. 53-55, 71-74.)

Just before 8:00 A.M., when more than 200 men on the day shift were to enter the mine, a shuttle car operator noticed a loss of air in his section of the mine. (R. 164.) He reported the condition to his foreman who then made an anemometer check and found the air to be flowing at a rate of only 11,000 cubic feet per minute. (R. 15, 18.) This is less than half the required level of 28,000 cubic feet per minute, the level supposedly ascertained by the foremen's preshift

measurements. (R. 65-66, 71-72.) The Company recognized the gravity of the apparent ventilation failure: the power was disconnected and the men ordered out of the mine—miners on the day shift who had entered were ordered to return above ground. (R. 18-19, 73-74, 148.)

The ensuing investigation revealed that a concrete overcast, a structure which channels the air delivered by the mine's ventilation system, had fallen and was preventing the proper amount of air from reaching the working faces, methane-liberating areas. (R. 14.) Records pertaining to the mine's main fan showed that the overcast must have fallen at about 4:00 A.M. (R. 18, 72, 228), prior to the pre-shift anemometer reading purportedly made by the three foremen, and some four hours before the loss of air was detected by visual means. During this four-hour interval the mine was in operation—with the normal result that methane was being liberated (R. 62)—and a mechanic's cutting torch was in use in one section. (R. 153.)

On Saturday, April 17, at the request of Local 6330, an inspection of the mine was made by federal and state mine inspectors, accompanied by Local 6330's safety committee. (R. 152-153, 229.) State Inspector J. M. Hovanic impounded the book of entries and the fan charts and notified the Company that he would prefer criminal charges against the three night-shift foremen for falsification of required entries. (R. 56, 98, 110-111.) As the Court of Appeals noted,

“The foremen had been guilty of significant dereliction. Indeed, they pleaded *nolo contendere* to a charge of criminal violation of safety requirements and were fined \$200 each.” (App. C at p. 14a.)

On Sunday, April 18, Local 6330 held a special meeting. The men were "very much concerned" about the recent events and the safety of the mine, and were "very anxious" to learn the results of the preceding day's inspection. (R. 153.) The safety committee reported that the state inspector had "seized the books" (R. 155), and that the foremen "made false entries in the record books." (R. 142, 153, 157.) The men were alarmed and outraged at falsification of ventilation records (R. 155), willful misconduct of the highest order which allowed an extremely hazardous condition to persist for hours and which was recognized even by the Company as rendering the entire mine unsafe. (R. 142, 229, 230.) The miners were aware that the behavior of the three foremen in question had fallen below accepted standards of safety numerous times in the past.² (R. 137, 140, 143, 154, 161-162.) Now, at the April 18 meeting, the miners unanimously passed a resolution to the effect that they would not work under the three foremen. (R. 137-138.)

The miners were convinced that the deliberate falsification of ventilation records, set against a pattern of unsafe supervisory conduct, proved the foremen to be wholly unreliable and a serious threat to the safe working of a mine classified "especially hazardous." (R. 115, 133-134, 142-144, 152-155.) The president of

² Already these foremen had been "brought to the local union's attention as being unfit" (R. 137); on particular occasions misbehavior by the foremen had been censured by the Local Union (R. 154), or specifically protested to management. (R. 143.) Use of a dangerous cable-coupling method known as a "West Virginia splice" (R. 142), shearing on the left side opposite the air flow (a practice prohibited by Company rules because of methane dangers) (R. 160-161), and other violations preceded the incident of April 15.

Local 6330, who attended the meeting, testified: "the men took a stand that they would not work with these foremen, that they valued their lives" (R. 133); "they didn't want to die with their boots on or they didn't want to get hurt or crippled" (R. 134); "there are so many different ways of getting hurt if you are not working safely." (R. 135.) Each miner who later testified about his reasons in voting for the resolution expressed a genuine fear for his personal safety if he were to work again under these supervisory personnel (R. 142, 143-144, 152)—"they made false entries in the record books and that proves they are not competent" (R. 142); "they were unsafe, and we had fear of our lives." (R. 152.)

In light of the miners' determination, Gateway agreed initially that the foremen would be suspended until state proceedings against them were resolved. (R. 52, 98-101, 112-113, 118.) Accordingly, the men reported for the night shift on April 18-19 and worked continuously thereafter until the agreement broke down and Gateway unilaterally reinstated two of the foremen (the third having retired) prior to the resolution of state criminal proceedings.³ (R. 52, 112, 118-19, 212.) Gateway timed the reinstatement so that it occurred the day after Memorial Day—a work stoppage then meant that the miners would forfeit their holiday pay.

³ Gateway relies on a letter from the Pennsylvania Bureau of Mines to justify reinstatement. (R. 212.) That letter was based on an *ex parte* plea by Gateway that the foremen's services were needed. (R. 91-92.) Gateway's president admitted that no information "whatsoever" was supplied to the state bureau concerning the record and performance of the foremen. (R. 93.) Thus no official investigation ever came to a conclusion different from that of the Gateway miners on the merits of the foremen's fitness.

(R. 97-98, 113-14, 194.) Nonetheless, the miners adhered to their decision and the stoppage began.

Two days after Gateway filed suit, the District Court conducted a hearing, enjoined the stoppage, and ordered that the miners submit the question "whether these men [the foremen] should return to work" to arbitration. (App. A at p. 3a.) The court did not attempt to decide the safety dispute on the merits, and in no way questioned either the *bona fides* or the reasonableness of the miners' apprehensions concerning intolerably dangerous working conditions.⁴ (App. B at pp. 8a-9a.)

The Court of Appeals, over a dissent, reversed. The Court rested its decision firmly on the narrow ground that the bargaining agreement in the present case

should not be construed as providing for compulsory arbitration of safety disputes. Accordingly, in this case neither the miners' refusal to work nor their refusal to arbitrate the safety dispute was a violation of their labor contract. There was no wrong to enjoin.⁵

(App. C. at p. 18a.)

⁴ Petitioner's brief hints that a dispute over "reporting pay" for the first shift on April 15 caused the stoppage. There is nothing whatever in the record to support this. The stoppage began on June 1, obviously because the foremen were reinstated then. (R. 112.) The complaint states that the stoppage arose directly from the safety dispute. (R. 4-5.) The district judge found this as fact. (App. B at pp. 8a-9a.)

⁵ In light of its narrow holding the Court of Appeals has not yet passed upon other arguments raised below by respondents. See note 10, *infra*, for a description of some of these alternative arguments.

A R G U M E N T

- I. THE WORK STOPPAGE AT GATEWAY MINE IS CONDUCT EXPRESSLY PERMITTED BY THE COLLECTIVE BARGAINING AGREEMENT IN THIS CASE, AND THUS THERE IS "NO WRONG TO ENJOIN."
- A. THE LEGALITY OF WORK STOPPAGES IN EMPLOYER SUITS UNDER SECTION 301 OF THE TAFT-HARTLEY ACT, 29 U.S.C. § 185, IS STRICTLY A MATTER OF THE CONTRACTUAL AGREEMENT BETWEEN THE BARGAINING PARTIES.

This is an employer's suit under Section 301 of the Taft-Hartley Act (formally, the Labor-Management Relations Act) to restrain a work stoppage. Section 301 empowers the federal courts to decide "[s]uits for violation of contracts between an employer and a labor organization," and this Court's decision in *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235 (1970), authorizes the issuance of anti-strike injunctions in some circumstances to redress the breach of a bargaining agreement.

Plainly, an employer in a suit of this kind must show that the work stoppage amounts to a contractual wrong. In order for injunctive interference to be appropriate, the collective bargaining agreement must impose a duty on the employees to refrain from stoppages over disputes that arise during the contract term, and a duty instead to submit such disputes to a grievance procedure culminating in "mandatory" arbitration. *Id.* at 253. Absent a contractual undertaking not to stop work, a stoppage cannot be enjoined or taxed with any other adverse legal consequences under Section 301. For there is "no compulsion in law" requiring American employees to forebear from striking during the term of a bargaining agreement,⁶ or to include in the agreement a no-strike pledge, and if the

⁶ In a few situations statutes may impose a duty of arbitration in lieu of self-help—see, e.g., *Brotherhood of R. R. Trainmen v. Chicago River & I. Ry. Co.*, 353 U.S. 30 (1957) (Railway Labor Act)—but no such statute obtains in the present situation.

parties do undertake to submit disputes to arbitration in lieu of self-help, "[t]he parties are free to make that promise as broad or narrow as they wish. . . ." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). Their rights are wholly "a matter of contract." *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

All of the above is elementary and unquestionable. So is the judicial duty, in a Section 301 case, to look closely at the bargaining agreement to determine whether the employees have or have not forfeited their right to strike.⁷ In the present case, the National Bituminous Coal Wage Agreement of 1968 is the relevant document,⁸ and the question is whether that contract permits or forbids the type of stoppage that occurred at Gateway Mine—a stoppage specifically to protest hazardous working conditions at the mine.

The first relevant feature of the present agreement is that it does not contain any express undertaking on the part of the miners to refrain from work stoppages during the term of the contract. Indeed, the agreement contains a clause expressly and emphatically disavowing any intent to impose a no-strike duty. (A. at p. 14a.)⁹

⁷ A Section 301 court must give "full play" to "the means chosen by the parties for settlement of their differences under a collective bargaining agreement." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

⁸ The 1968 Agreement was in effect at the time of the Gateway stoppage, and will be referred to herein as the "present" or "instant" agreement, though in fact it has since been superseded by the 1971 National Bituminous Coal Wage Agreement.

⁹ Paragraph 1 of the "Miscellaneous" section declares that the no-strike promises of previous agreements, such as the 1941 and 1945 agreements, "are hereby rescinded, cancelled, abrogated and made null and void." See note 34, *infra*.

The second relevant feature is the arbitration clause. (A. at pp. 13a-14a.) Petitioner's argument starts with the proposition that an implied no-strike duty may be derived from the arbitration undertaking. That clause is both general and vague, and certainly does not speak to the question of the right to stop work in the face of hazardous conditions underground. But if the only relevant contractual features were the two already mentioned, issue would be joined on the following question: whether, despite the express disavowal of any no-strike promise, such a duty may nonetheless fairly be implied from the arbitration clause on the authority of *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).¹⁰

¹⁰ Respondents' position on this broad question includes two contentions that are not restricted to safety stoppages: First that the rule of *Lucas Flour*, *supra*, should not be carried over into the *Boys Markets* setting. *Lucas Flour* involved an employer's Section 301 suit for damages caused by an allegedly illegal work stoppage, and thus this Court's ruling—that a no-strike duty might be implied from an arbitration promise—occurred in a context in which the special anti-injunction policies of the Norris-LaGuardia Act were not applicable. In the *Boys Markets* context, on the other hand, "implying a no-strike clause would subordinate to industrial peace not only freedom of contract but also the Norris-LaGuardia Act." Note, *The New Federal Law of Labor Injunctions*, 79 Yale L. J. 1573, 1600 (1970). (The question remains open since in *Boys Markets* there was an express no-strike promise in the agreement.)

Second, that even under *Lucas Flour*, it is improper to "imply" a no-strike promise of any sort from the present agreement. On this point the crucial fact is that each bituminous coal agreement since 1947 has by express language rescinded and nullified the no-strike promises of pre-1947 agreements. See note 9, *supra*, and note 34, *infra*. For more than a decade there has been a conflict among the circuits on this precise issue; indeed, this Court in *Lucas Flour* noted but declined to resolve the conflict, see 369 U.S. at 106, n. 15, and the question remains open in this Court. The most recent judicial writing on the topic comes from the Third

But that question, while a subject of briefing and argument in the Court of Appeals, was not addressed or decided below nor need it be by this Court.¹¹ For there is a third feature of the present agreement that decides this case—a specific contractual provision that expressly confers on the miners the right to walk out in protest against unsafe conditions at the mine.

B. THE COLLECTIVE BARGAINING AGREEMENT EXPRESSLY PRESERVES THE MINERS' RIGHT TO STOP WORK IN THE FACE OF HAZARDOUS CONDITIONS UNDERGROUND.

The salient fact about this case is that the collective bargaining agreement expressly provides that coal miners may stop work in the face of hazardous conditions left uncorrected by management. Almost incredibly, petitioner's brief on the merits does not even inform this Court of the specific contractual language that is at the heart of this litigation. But that disingenuous omission¹² does not change the fact that the bargaining agreement specifically permits safety walkouts by coal miners. And it follows with respect to the Gateway stoppage, as the Court of Appeals held, that there is "no wrong to enjoin." (App. C, p. 18a.)

The contractual right in question is embodied in the part of the agreement labelled "Mine Safety Program," specifically section (e) of that part. (A. at pp.

Circuit, and adopts respondents' position. See separate opinion of Judge McLaughlin, *Bethlehem Mines Corp. v. UMWA* (C.A. 3, No. 72-1466, April 6, 1973).

¹¹ Should the narrow holding of the Court of Appeals be reversed, the case should be remanded to that court for consideration of respondents' remaining arguments, including contentions sketched in the preceding footnote.

¹² Respondents' contractual arguments in both courts below centered on the provision now under discussion, as does Judge Hastie's opinion.

12a-13a.) Section (e), set out in pertinent part at the margin,¹³ deals with the Mine Safety Committees that are required to be established at every coal mine covered by the bargaining agreement. Each Safety Committee is a subordinate body of a particular UMW local; safety committeemen are agents of their local union, paid by the local and elected by their fellow members. Among contractual powers of the safety committee are the power to "inspect any mine development or equipment used in producing coal," and "[i]n those special instances where the committee believes an immediate danger exists," the power to "clos[e] down an unsafe area" and "remove all mine workers" from the mine.¹⁴

Two key aspects of the provision described are obvious on the face of things. First, section (e) reserves to the miners, acting through a committee of their local union, the right to initiate work stoppages in the face of hazardous conditions underground. Plainly

¹³ (e) Mine Safety Committee

At each mine there shall be a mine safety committee selected by the local union. . . .

The mine safety committee may inspect any mine development or equipment used in producing coal. If the committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the committee believes an immediate danger exists and the committee recommends that the management remove all mine workers from the unsafe area, the operator is required to follow the recommendation of the committee.

If the safety committee in closing down an unsafe area acts arbitrarily and capriciously, members of such committee may be removed from the committee. Grievances that may arise as a result of a request for removal of a member of the safety committee under this section shall be handled in accordance with the provisions for settlement of disputes.

¹⁴ See the preceding footnote.

enough, any exercise of this contractual right cannot be regarded as a breach of the contract. Second, under the contract the miners are the sole judge of whether a particular hazard is so grave and immediate that continued submission to it is intolerable. There is no occasion to invoke the provision unless the mine operator refuses to recognize the gravity of the danger or refuses to take corrective steps; in any event, exercise of the right is a matter committed to the good faith determination of the miners themselves, and is in no way conditional upon the concurrence of the operator or any governmental authority.¹⁵

The agreement, in short, specifically recognizes the miners' right to withhold services in order to induce the operator to correct conditions which the miners regard as involving intolerable danger.

1. The Bargaining History Emphatically Underscores the Miners' Contractual Right to Engage in Safety Stoppages.

The contractual provision under discussion was the fruit both of hard and deliberate bargaining by a strong union and of public and congressional outrage at slaughter in the nation's coal mines.¹⁶ The relevant

¹⁵ As Judge Hastie wrote for the Court of Appeals, "... the labor contract specifically provides that, regardless of the views or judgment of the operator, a mine must be closed if the mine safety committee of the local union finds it immediately dangerous."

(App. C at p. 15a.)

¹⁶ "The very nature of a collective bargaining agreement requires that it be read in the light of bargaining history. . . ." *Communications Workers v. Pacific Northwest Bell Tel. Co.*, 337 F.2d 455, 459 (C.A. 9, 1964). See also *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*, 422 F.2d 546 (C.A. 7, 1970); *Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555 (C.A. 2, 1965); *Jennings v. Westinghouse Elec. Corp.*, 283 F. Supp. 308 (S.D. N.Y., 1968). Here, uniquely, the relevant bargaining history is a matter of public record.

bargaining history occurs during the period 1941 to 1947. That history includes a unique congressional inquiry into precisely the matter involved in this litigation—the contractual right of bituminous coal miners to stop work in safety disputes. The bargaining history reveals unmistakably the intended breadth of the contractual provision conferring that right, its purpose and its vital importance to the men whose lives and safety are at stake.

The 1941 bargaining agreement provided for a local union safety committee at each mine with broad powers to inspect and make reports to management, but with no power to close the mine in the face of hazardous conditions.¹⁷ In the spring of 1946 negotiations for a new national agreement centered on improved mine safety as one of the union's two major demands,¹⁸ including the specific demand that the miners be expressly authorized to stop work in safety disputes.¹⁹ Deadlock in the negotiations led to a nation-wide stoppage, and, in light of the need for uninterrupted coal production in the immediate post-war period, President Truman seized the nation's coal mines on May 21, 1946. See Executive Order No. 9728, 11 F.R. 5593. See generally *United States v. United Mine Workers*, 330 U.S. 258 (1947).

¹⁷ Appalachian Joint Wage Agreement of 1941, section entitled "Safety Practices." The 1941 agreement contained a broad no-strike clause, entitled "Illegal Suspension of Work," that altogether barred stoppages during the term of the agreement.

¹⁸ The other concerned the establishment of a welfare and retirement fund.

¹⁹ See *Minutes of the National Bituminous Coal Wage Conference*, vol. II at pp. 91-92 (April 1, 1946), 699 (April 2, 1946), 701 (April 3, 1946), and 718 (April 10, 1946).

On May 29, 1946, a new bargaining agreement (known as the Krug-Lewis agreement²⁰) was executed by the Union and the United States. The Krug-Lewis agreement "embodied far-reaching changes favorable to the miners," *United States v. United Mine Workers*, 330 U.S. at 263; in particular, the agreement expressly permitted the local union safety committees to initiate safety stoppages, though the Federal Coal Mines Administrator (Krug) was given ultimate power to halt any such stoppage if his own determination of the gravity of the danger differed from that of the miners.²¹

The occasion for congressional scrutiny of the miners' contractual right to close unsafe mines came on the afternoon of March 25, 1947, when the Centralia No. 5 coal mine in Wamac, Illinois, exploded and 111 coal miners lost their lives. The death toll of the Centralia

²⁰ Krug was Secretary of the Interior and Coal Mines Administrator; Lewis was the UMWA's International President.

²¹ National Bituminous Wage Agreement of 1946 (Krug-Lewis):

"2. Mine Safety Program

...

(b) Mine Safety Committee

...

If the Committee believes conditions found endanger the life and bodies of the mine workers, it shall report its findings and recommendations to the management. In those special instances where the Committee believes an immediate danger exists and the Committee recommends that the management remove all mine workers from the unsafe area, the operating manager or his managerial subordinate is required to follow the recommendation of the Committee, unless and until the Coal Mines Administrator, taking into account the inherently hazardous character of coal mining, determines that the authority of the Safety Committee is being misused and he cancels or modifies that authority."

disaster was the worst in almost two decades—indeed, in the quarter of a century since Centralia only one coal mine explosion has surpassed the Centralia slaughter,²² and Centralia stands today as the second worst disaster of modern coal mining.²³ In the classic mold, Centralia was caused by flagrant violations of the law and safe practice.²⁴ The ensuing congressional investigation of the Centralia tragedy came to focus directly on the role of the miners themselves in preventing such disasters, thereby throwing unique and piercing light on the contractual provision that is at the heart of this case.

Secretary Krug testified at length concerning the safety stoppage provision of the Krug-Lewis agreement before the special Senate subcommittee investigating Centralia. According to Krug, the provision was a “revolutionary reform, which the union had sought for many years”—the contractual right of the miners to close unsafe mines was one of “the two most important moves toward safety in the history of the soft coal industry.” *Hearings before the Special Subcommittee of the Senate Committee on Public Lands*, pursuant to S. Res. 98, 80th Cong., 1st Sess., at 298 and 300 (April 10, 1947) (hereinafter *Senate Centralia Hearings*).²⁵ Krug emphasized repeatedly that

²² 119 dead, Orient No. 2 mine, West Frankfort, Illinois, December 21, 1951.

²³ See generally H. Humphrey, *Historical Summary of Coal-Mine Explosions in the United States, 1810-1958* (U.S. Bureau of Mines Bulletin 586, 1960).

²⁴ See generally M. Ankeny, *Final Report of Mine Explosion, No. 5 Mine, Centralia Coal Company* (U.S. Bureau of Mines, 1947).

²⁵ The 1941 provision was admittedly “ineffectual.” *Senate Centralia Hearings* at 318.

under the agreement the local union safety committees "have complete authority to pull out the men in all cases of immediate danger," *id.* at 305.²⁶ After Senator O'Mahoney read the specific contractual language into the record, Krug testified:

"I don't think there is any dispute over the meaning of it. At least I never heard of any and it is all very simple despite the rather long, legal wording of it. It was to give the Mine Safety Committee *complete authority to get the men out of the mine if they felt the mine was unsafe. . . .*"

Id. at 312 (emphasis added). Apart from the ultimate power of the Coal Mines Administrator to override the decision of the miners, the right of the miners themselves to engage in safety stoppages was characterized in the most sweeping terms: the miners' power "to close dangerous mines" is "absolute," *id.* at 298 and 317; "complete and absolute," *id.* at 318.

Krug testified with some eloquence concerning the purpose of the provision authorizing safety stoppages. The union had made a "compelling argument," he said, that "Federal inspectors could never achieve continuous mine safety without the day-to-day participation of the miners themselves." *Id.* at 298.

"Safety depends upon day-to-day operations, and it is not a static condition. Without the active participation and cooperation of the miners, reasonable mine safety cannot be achieved. Without the minute-by-minute vigilance of these men, each one a safety expert in his own right, the mine is

²⁶ See also *Senate Centralia Hearings* at p. 317 (Krug-Lewis "authorizes the mine safety committees to close the mines where they believe immediate danger exists").

bound to revert to unsafe conditions or practices. With an active union Mine [Safety] Committee in every mine there would be a constant police force to insure against needless violations of the Code. In every mine there would be a group of experts, qualified by experience and alerted by the most rudimentary instincts of self-preservation, with power to close the mine the minute that it became dangerous.”

Id. at 301. Krug’s only complaint was that the miners were not yet exercising their contractual power with sufficient vigor, and in particular, that the Centralia safety committee should have called a safety walkout to protest the operator’s negligence. See *id.* at 304 and 312.²⁷

John L. Lewis, before the House Committee investigating Centralia, testified at length concerning the miners’ contractual right to engage in safety stoppages. *Hearings on Welfare of Miners before the House Committee on Education and Labor*, 80th Cong., 1st Sess., vol. I at 6-8, 12, 17, 24, 44, 56, 58 (April 3, 1947) (hereinafter *House Centralia Hearings*). He agreed with Krug—and his congressional interlocutors—that the contract itself allowed the miners to close unsafe mines, but explained that the miners felt constrained not to engage in any sort of stoppages during the period of government operation of the mines,²⁸ on account of the *in terrorem* effect of the 1946

²⁷ The sole surviving member of the Centralia safety committee, Mr. Maloney, testified that he had been unaware of the miners’ contractual right to stop work. *Senate Centralia Hearings* at 68.

²⁸ The Centralia mine was still operated by the federal government at the time of the disaster.

anti-strike injunction enforced by this Court in *United States v. United Mine Workers*, 330 U.S. 258 (1947). See *House Centralia Hearings* at 8, 24, 56, 58.²⁹ Lewis also noted that the 1946 agreement allowed Krug to overrule the judgment of the miners on the question of hazardous conditions. *Id.* at 7, 17.

The final Senate report on Centralia follows the testimony summarized above: it emphasizes the contractual power of the local union safety committee "to remove all mine workers from the unsafe mine," acting solely on its own assessment of danger,³⁰ and lends support to the contention that the miners' power had not yet been exercised with sufficient vigor and, in particular, should have been invoked at Centralia.³¹

On July 8, 1947, less than three and a half months after the Centralia explosion, the union and the private coal operators executed the National Bituminous Coal Wage Agreement of 1947. That private agree-

²⁹ "... a combination of the injunction and the Smith-Connally provisions caused our membership to thoroughly understand that they could close down a mine only at their own hazard." *House Centralia Hearings* at 24.

³⁰ Senate Comm. on Public Lands, *Investigation of Mine Explosion at Centralia, Ill.*, S. Rep. No. 238, 80th Cong., 1st Sess. at 10 (June 5, 1947).

³¹ *Id.* at 10-11. The Senate Report noted that since the effective date of Krug-Lewis, "in but one instance had the mine safety committee exercised its authority to close a mine"; that the UMWA had not done a thorough job of instructing local safety committeemen of their powers and duties in this regard; and that the federal Bureau of Mines "had instituted a course of instruction for the mine safety committees, but its operation at the time of the Centralia explosion was almost entirely confined to the State of West Virginia." *Id.* at 11.

ment brought forward in unqualified terms the right of coal miners to engage in safety walkouts. The provision concerning safety stoppages in the 1947 agreement is precisely the same, word for word, as the provision of the 1968 agreement invoked by the Gateway miners in the instant case.³² Moreover, the 1947 provision is identical to the provision of the Krug-Lewis agreement³³ that received so careful an explication in the Centralia hearings, with one vital exception: the clause allowing the Coal Mines Administrator to override the miners' judgment was deleted, and thereby the 1947 agreement truly made the miners' own determination "absolute," not subject to reversal by the operator or governmental authorities or anyone else. Thus the operators finally yielded to what Krug called the union's "compelling argument"—and to the mute argument of the Centralia disaster itself—that the miners should be fully empowered to act on their own in order to prevent the tragic loss of life that had occurred at Centralia.³⁴

³² Hence, for the exact wording of the 1947 provision (which also is labelled section (e) of the agreement's "Mine Safety Program"), see the 1968 provision quoted at n. 13, *supra*.

³³ See n. 21, *supra*.

³⁴ The 1947 agreement perfected the right to engage in safety stoppages by expressly rescinding and repudiating all previous no-strike undertakings on the part of the union, thus removing the possibility of anti-strike injunctions and the *in terrorem* effect Lewis had complained of in the House Centralia Hearings. The 1947 rescission clause is carried forward, word for word, in the 1968 agreement. See n. 9, *supra*. See also *United Mine Workers v. NLRB*, 257 F.2d 211, 216 (C.A.D.C., 1958):

"The 'legislative history' of the [rescission clause] is interesting and enlightening. The 1941 Appalachian Joint Wage Agreement plainly and expressly contained agreements not to strike. On July 8, 1947, the National Bituminous Coal Wage

Two concluding points may be drawn from the bargaining history.

First, the provision for safety stoppages was the fruit of long and difficult bargaining in the face of what Krug called the "violent opposition" of the private operators, *Senate Centralia Hearings* at 311, and has been maintained to the present because of continued bargaining strength. It is impossible to say exactly what benefits the coal miners gave up to secure this precious right of immense importance to them. But it is obvious that the bargaining was hard and deliberate and that the operators in July of 1947 knew full well the nature of the right they agreed to recognize. The point of all this is that it would be a travesty for the courts now to brush aside a provision having such roots.

Second, the petitioner's position in this case is built upon arguments that are simply not cognizable because they were resolved, against petitioner, at the bargaining table. For example, petitioner and petitioner's *amici* complain that recognizing the right of safety stoppages would lead to a rash of wildcat strikes only pretextually related to safety issues. But as Krug testified, that very *bete noir* was the stated reason for the operator's "violent opposition" in 1941 and 1946 and it was laid to rest in 1947 by the operators' acquies-

Agreement of 1947 was executed. The Taft-Hartley Act, with its section 301 providing for suits by and against labor unions for breach of contract, had been approved on June 23 of that year. The 1947 agreement for the first time included a 'Miscellaneous' article. Subsection 1 of that article rescinded all 'no-strike,' 'penalty,' and 'illegal suspension of work' clauses contained in earlier agreements. This was done to remove the danger that the union might be sued for breach of contract under the new statute."

cence in the union's "compelling argument" to the contrary. See *Senate Centralia Hearings* at 300-301.³⁵ In fact, the right to stop work was exercised only once in the first year³⁶ and very infrequently since. For another example, petitioner asserts that the existence of governmental powers in the area of mine safety enforcement negates the utility of the safety stoppage. But the contractual right to engage in safety walkouts was granted at the very point in history when governmental power was the greatest—when the government ran the mines—and was granted because, as Krug put it, "without the minute-by-minute vigilance" of the miners, "the mine is bound to revert to unsafe conditions or practices." *Id.* at 301. The miners' contractual power "to enforce safety on their own" was plainly intended as a vital supplement to governmental powers, see *id.* at 298-99, 301, 317-18, and it remains so.³⁷

2. The Arbitration Clause in the Present Agreement in No Way Undercuts the Bargained-For Right to Engage in Safety Stoppages.

Petitioner, as a Section 301 suitor, must find somewhere within the four corners of the bargaining agreement a contractual duty incumbent upon its employees to refrain from safety stoppages. As noted earlier, since the present agreement not only fails to include

³⁵ See also *Senate Centralia Hearings* at 311:

"Senator O'Mahoney: What was their [the private operators'] point of view?

"Mr. Krug: They were violently opposed to the mandatory powers of the mine safety committee—violently opposed.

"They said that the union had attempted to get such a provision—I think they told me since 1941—that in their judgment it was not to promote safety but as a cover-up for wildcat strikes. . . ."

³⁶ See note 31, *supra*.

³⁷ See pp. 41-44, *infra*.

any express no-strike promise but also expressly renounces any such undertaking,³⁸ petitioner is left with the contention that a duty to refrain from safety stoppages may be *implied* from the agreement's arbitration clause. In light of what has already been said, that contention is nothing short of frivolous.

The arbitration clause says that "an earnest effort shall be made" to resolve disputes of an unspecified nature through grievance discussions and arbitration if necessary.³⁹ Petitioner relies, not on the language of the clause, but on an *implication*—that is, the duty to arbitrate is said to "imply" that the employees are obliged to remain at work and submit to the disputed condition or practice pending arbitration, and then abide the arbitrator's decision.⁴⁰ The "implied" duty, in short, is the duty not to engage in any sort of self-help. Now even if the contract did not speak to the question of safety stoppages, any implication from the arbitration clause in that connection would be exceedingly weak at best—in light of the fact that this vague, catch-all clause is aimed at settling a host of problems other than the paramount problem of mine safety, and certainly does not by terms require submission to hazardous conditions while an arbitrator mulls the matter over.⁴¹

³⁸ See notes 9, 10, & 34, *supra*.

³⁹ The clause is printed in full at A., 13a-14a.

⁴⁰ Petitioner sometimes refers to Paragraph 3 of the "Miscellaneous" clause, A. at 15a, as another source of the "implication," but that language has no force independently of the arbitration clause to which it refers.

⁴¹ In the absence of an express undertaking to refrain from work stoppages, the *Lucas Flour* doctrine should not be used to "imply" such an undertaking *as to safety stoppages*, for reasons discussed in Part III.B., *infra*.

But of course there is another provision in the agreement, studiously ignored by petitioner, which makes hash out of petitioner's "implication." That provision specifically contemplates self-help instead of submission to unsafe conditions; it states plainly that the miners may make their own determination with respect to the safety of the mine and may act on that determination. Petitioner's "implication" would utterly destroy the express provision authorizing safety stoppages, and would turn the clock back to 1941. The mere suggestion is absurd, running directly contrary to the language of the contract and the whole bargaining history.⁴² The fact is that as to safety matters, the miners are not contractually obligated to await arbitration and abide the result.⁴³

⁴² The 1947 agreement, which perfected the safety stoppage right, contained an arbitration clause identical in every pertinent respect, word for word, with the present arbitration clause.

⁴³ In response to a safety stoppage an employer's only recourse under the contract is to request removal of the safety committeemen on the ground that "in closing down an unsafe area" they had acted "arbitrarily and capriciously." See note 13, *supra*. The request for removal may be arbitrated and, as petitioner and its amici well know, such arbitrations have occurred from time to time. See, e.g., *Truax-Traer Coal Co.* (No. 5308, Ill. Coal Operators Assn., 1971). But there is no contractual duty to refrain from stopping work pending arbitration of the "arbitrary and capricious" issue—indeed, absent a work stoppage there is no occasion for the employer to grieve!

Moreover, the contract gives the arbitrator no power to order the end of a safety stoppage. He may grant or deny the request for removal of the safety committeemen, and that alone. The bargaining parties knew how to confer on the arbitrator the power to "cancel or modify" the miners' action (quoted terms from the Krug-Lewis agreement, at n. 21, *supra*), and they withheld such power. Thus the contract preserves employee self-help on the mat-

Respondents' position, in a nutshell, is that express, bargained-for contractual rights are not to be defeated by "implication." "No court has shown such disdain for private ordering as to suggest the contrary. Even the purported authority for petitioner's "implication" — *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962)—teaches that a no-strike duty is not "to be implied beyond the area which it has been agreed will be *exclusively* covered by compulsory terminal arbitration." *Id.* at 106 (emphasis added). Here it plainly cannot be said that arbitration is the "exclusive" means of resolving disputes that underlie safety stoppages, since the contract expressly provides that concerted refusal to submit to a hazardous condition is a permissible means of self-production and self-help.⁴⁵

ter of greatest significance to miners, and imposes an arduous burden of proof to guard against employer reprisals.

In any event, in the present case it is not necessary to consider the scope of the arbitrator's power since Gateway never sought "arbitrary and capricious" removal and thus never triggered the limited arbitral procedure available.

⁴⁴ Even if an express no-strike clause such as that of the 1941 agreement had been retained in the present agreement, respondents believe that the safety stoppage provision still should prevail in the (hypothetical) clash of express provisions. The principle, one of the "accepted principles of traditional contract law," *Lucas Flour*, 369 U.S. at 105, is that a specific provision authorizing safety stoppages should prevail over a general no-strike provision not negotiated with an eye to the paramount problem of mine safety.

⁴⁵ Respondents object to the implication of *any* sort of no-strike promise from the present agreement; as noted earlier, there is a long-standing and unresolved conflict among the circuits on this issue. See n. 10, *supra*. But the very Courts of Appeals that have held against respondents on the broad issue have also recognized, as then-Judge Stewart put it, that

"[t]his conclusion does not make meaningless the express abrogation of a no strike clause in the . . . agreement. The right to strike was preserved with respect to all disputes not

Finally, petitioner seems to think that if safety stoppages are allowed, the arbitration clause is utterly defeated as to all matters remotely touching coal mine health and safety. This is false. Arbitration is indeed the proper way to settle unresolved disputes *except* in those rare situations when the miners regard continued submission to hazardous conditions as intolerable and elect to exercise their right of self-help. Though the miners' own judgment in making that election is final, the contract itself indicates that the right to stop work should be reserved for "special instances where the committee believes an immediate danger exists," and as might be expected, the decision to forfeit wages in order to protest unsafe conditions is rarely made. Quite wisely, the contract does not say that all "safety disputes" are excluded from the arbitration clause, but instead leaves the miners with the option of having the run of safety grievances, not involving intolerable danger, resolved through the grievance procedure culminating in arbitration if necessary.⁴⁶ The contract,

subject to settlement by other [i.e., arbitral] methods made exclusive by the agreement."

Lewis v. Benedict Coal Corp., 259 F.2d 346, 351 (C.A. 6, 1958), *aff'd equally divided on this issue*, 361 U.S. 459 (1960). Hence *Benedict Coal* refused to imply a no-strike obligation as to disputes "national in scope," finding that a clause then and now labelled Paragraph 3 under "Miscellaneous" (see A. at p. 15a) defeated any such implication based on the arbitration clause. *Accord*, *Old Ben Coal Corp. v. UMW Local 1487*, 457 F.2d 162, 164 (C.A. 7, 1972).

⁴⁶ This point is made even clearer in the 1971 agreement, executed after the Gateway stoppage and in effect today. Article III of the 1971 agreement, entitled "Health and Safety," continues the historic provision permitting safety stoppages in "special instances," and in the very next section establishes an expedited procedure for settlement of other safety disputes through grievance discussions and arbitration by safety experts. It is impossible to look at these two safety provisions of the 1971 agreement, printed one after the other, and think that either one cancels out the other.

in short, provides an arbitral mechanism for peaceful settlement of all manner of grievances but takes care to leave the option of stopping work in the face of uncorrected hazardous conditions. This is a perfectly sensible and salutary plan that is well adapted to the realities of coal mining. See generally 41 *Cincinnati L. Rev.* 943 (1972) (case comment on the decision below).

3. Injunctive Interference Is Improper Herein Since the Gateway Stoppage Is a Good Faith Exercise of the Miners' Contractual Right to Stop Work.

It remains only to ask what kind of inquiry a *Boys Markets* court should conduct when coal miners defend against an injunction suit on the ground that their work stoppage is an exercise of the contractual right to engage in safety stoppages. The answer is easily stated: a court should look into the facts deeply enough to determine whether the stoppage was motivated by the miners' apprehensions about the safety of the mine. If the court is satisfied that a *bona fide* safety dispute does in fact figure centrally in the stoppage, then it follows that the stoppage is an exercise of an express contractual right and cannot be enjoined.⁴

The test, in short, is the miners' good faith. Naturally, inquiry to determine a *bona fide* concern about safety will tend to shade into an inquiry whether there is a reasonable or at least an arguable basis in fact for the avowed concern. But the test ultimately focuses on sincerity, as the Court of Appeals recognized, be-

⁴ On the other hand, when the safety issue is trumped up and wholly pretextual, it cannot be said that the stoppage is as a matter of fact an exercise of the miners' right to engage in safety stoppages.

cause the contract allows the miners to act on their own honest assessment of danger.⁴⁸

The words of the contract, the evident design of the contract, and the bargaining history all underscore the point that the miners' *bona fides* is the only matter at issue before a *Boys Markets* court. The contract does not say that walkouts are permissible in instances of grave and immediate danger—it says that stoppages are permissible in instances “*where the committee believes*” such a danger exists. The contractual right is couched in purely subjective, discretionary language.⁴⁹

Faced with a safety stoppage the mine operator will contend that the condition or practice it has refused to correct does not pose an intolerable danger, and in any given case the hypothetical “reasonable man”—or some actual judge or arbitrator—might after a full airing of the facts be persuaded to agree with the company's position on the merits of the underlying safety dispute. But these truisms do not alter the fact that the whole point of the present agreement is to ensure a right of self-help in safety disputes and allow the miners to act on the basis of their own assessment of danger. In so acting they do not breach the agreement. That is the design of the bargaining parties, and the bargain must be honored by the courts. *Boys Markets*

⁴⁸ Petitioner claims that the Court of Appeals read a “subjective test” into Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143 and that this is error. The fact is that the court did not purport to construe Section 502, subjectively, objectively, or otherwise. See pp. 45-47, *infra*. The rights of the Gateway miners spring from their own bargaining agreement, so there is no occasion in this case to decide whether Section 502 confers independent protection.

⁴⁹ See note 13, *supra*.

courts do not sit to enforce their own notions of good policy and proper behavior, nor to decide whether one of the parties acted wisely in invoking its reserved rights under a collective bargaining agreement.

The whole of the bargaining history, recounted earlier, supports the fundamental point that the miners' own good faith assessment of danger is conclusive. In particular, it makes no difference whether government inspectors did or did not share the apprehensions of the Gateway miners. The situation at the Gateway mine, prior to the walkout, was similar to that at Centralia, where government inspectors had found safety violations but did not take the step of ordering the mine closed. By acting on their own the Gateway miners simply did what the Centralia miners were criticized—posthumously—for failing to do.

On the facts, there is no escaping the conclusion that the Gateway stoppage was squarely within the contract. Both the District Court and the Court of Appeals found that the stoppage was motivated by the miners' good faith apprehensions concerning the safety of the mine.⁵⁰ These apprehensions were grounded in specific, "objective" facts and were palpably reasonable.⁵¹ Thus the stoppage was in fact

⁵⁰ See App. B at pp. 8a-9a (District Court). As Judge Hastie wrote for the Court of Appeals,

"There is no finding, indeed no basis for a finding in this record, that the miners did not honestly believe that their lives were unduly endangered so long as the foremen in question were responsible for safety procedures. The foremen had been guilty of significant dereliction." (App. C at p. 14a.)

⁵¹ See Counterstatement of the Case, *supra*. One indication of the reasonableness of the miners' fears, in the eyes of the District Court, is that the anti-strike injunction was made conditional upon the suspension of the foremen pending court-ordered arbitration.

an exercise of the miners' contractual right to act on their own assessment of danger in a safety dispute.

In the body of its brief, petitioner does not meet the foregoing argument because petitioner completely ignores the contractual provision authorizing safety stoppages. But certain contentions can be anticipated.

First, petitioner's Statement of the Case includes the cryptic remark that the Gateway safety committee "did not invoke or follow" contractual procedures for safety walkouts.⁵² What is meant is a mystery since not another word is said about the contractual provision in question.⁵³ Respondents agree with Secretary Krug that the provision

"... is all very simple despite the rather long, legal wording of it. It was to give the Mine Safety Committee complete authority to get the men out of the mine if they felt the mine was unsafe."

Senate Centralia Hearings at 312. Precisely that "authority" was invited here. See Judge Hastie's opinion for the Court of Appeals. (App. C at p. 15a.)⁵⁴

⁵² Petr. Brief at p. 8.

⁵³ There is a faint suggestion that petitioner believes certain undescribed formalities were not complied with, and perhaps petitioner will explain in its reply brief. Respondents leave it to the Court to decide whether rigid formalities are compatible with what Krug called the "power to close the mine the minute that it became dangerous." *Senate Centralia Hearings* at 301.

⁵⁴ After the ventilation failure at the Gateway mine, the safety committee of the Gateway local requested an investigation by state and federal mine inspectors, learned of the willful and blatant safety violations by the three foremen and reported their findings to the local membership. (R. 152-53, 155.) After discussion of the matter, the more than 200 members present at the meeting, including the safety committeemen, voted unanimously not to continue to submit to the danger perceived. (R. 137-38.) The company was informed of their determination. (R. 24.) As one of the three Gateway safety committeemen testified at trial below, the miners resolved "that we would not return to work and work with these

Second, petitioner complains that the Gateway stoppage was not confined to the third (midnight) shift. The argument is made in terms of the scope of Section 502, which is beside the point. For the Gateway miners, under the contract, were authorized to act on their view that the presence of criminally negligent foremen in an active supervisory role would lead to the creation of physical hazards, or a failure to detect and correct such hazards, thereby endangering the mine around the clock.⁵⁵ It cannot be said, and the courts below did not find, that there was any lack of good faith in this connection. Moreover, the contractual right to engage in safety stoppages is a right of protest against management's failure to take corrective steps in the face of a danger considered intolerable by the miners. The nature and scope of the danger and the propriety or wrongfulness of management's failure to act are, of course, elements of the basic dispute, and the miners are entitled to engage in self-help in support of their own views on these topics.

Finally, petitioner emphasizes that after the anti-strike injunction was issued by the District Court, an arbitration took place as ordered and the umpire found for the company on the merits of the safety dispute. But the question in this case is whether the

bosses involved in this safety issue," because "the presence of these supervisors in the mine *would render the mine unsafe*." (R. 142 (emphasis added).)

⁵⁵ The view is entirely reasonable given the nature of modern, mechanized coal mining. A foreman's failure to follow safety precautions in roof-bolting, rock-dusting, electrical repair, or any of a myriad of tasks, sets up a hazard that does not disappear at the end of the shift. A foreman's failure to conduct inspections and examinations and log data accurately obviously deprives future decision-making of vital information. Indeed, in this case the falsification of records occurred with respect to a preshift examination, and the dereliction put the incoming shift in even greater jeopardy than the foreman's own shift.

miners have a bargained-for right to act on their own views and apprehensions. Since they do, the District Court erred in enjoining the stoppage and in compelling arbitration in the place of self-help. The outcome of the arbitration herein is simply irrelevant.⁵⁶ For present purposes respondents would concede that reasonable persons—including reasonable arbitrators—might well differ on the merits of the Gateway safety dispute. The decisive point is that the Gateway miners are not contractually obliged to submit to disputed conditions and abide the decision of an arbitrator, but may elect to act on their own good faith determination, regardless of the contrary views of the company, courts or arbitrators.⁵⁷

II. THERE IS NO RATIONAL FOUNDATION FOR A "PRESUMPTION" OF ENJOINABILITY THAT WOULD OVERRIDE EMPLOYEES' EXPRESS CONTRACTUAL RIGHT TO ENGAGE IN SELF-HELP, AND NO COURT HAS EVER SUGGESTED THAT THERE IS.

Petitioner's arguments in this Court seem to turn on the assertion that the "presumption of arbitrability" set up in the *Steelworkers Trilogy*,⁵⁸ plus *Boys Markets*, equals a "presumption" of enjoinability that overrides the contractual rights asserted by the

⁵⁶ The arbitrator never doubted that the miners had made a good faith determination with regard to the safety of the mine—he simply substituted his own determination (as the District Court ordered him to do). See App. G at pp. 47a and 50a.

⁵⁷ For these reasons, the Court of Appeals ordered that the arbitrator's decision (App. G) be stricken from the record of this case. See A. at 38a. For like reasons petitioner's contention that the arbitrator's decision should be given "binding effect" is without merit.

⁵⁸ *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Gateway miners. As an initial matter it would seem that any sort of "presumption" in favor of enjoinderability of work stoppages, even if such a thing should exist in the law, has been fully overcome in this case. But there are far more fundamental objections.

First, while it is true that *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 US. 574 (1960), did establish a "presumption of arbitrability" for use in certain Section 301 contexts, it is a complete misuse of the concept to invoke it in the present situation. In *Warrior & Gulf* there was a broad arbitration clause not qualified with respect to any specific subject, and the union brought a Section 301 suit to compel arbitration of a dispute concerning the employer's practice of contracting out work. This Court through Justice Douglas held that a Section 301 court ought not to pass on the merits of a grievance in deciding the threshold question of arbitrability, when it was the arbitrator's judgment that was bargained for.

But *Warrior & Gulf* emphasizes several times that the question of arbitrability is properly to be decided by the court, and that "any express provision excluding a particular grievance from arbitration" must be honored. 363 U.S. at 584-85.

"A specific collective bargaining agreement may exclude contracting out from the grievance procedure. Or a written collateral agreement may make clear that contracting out was not a matter for arbitration. In such a case a grievance based solely on contracting out would not be arbitrable."

Id. at 584. Thus the "presumption of arbitrability" simply does not apply when the agreement expressly provides that a particular category of disputes may

be resolved by methods other than compulsory arbitration.⁵⁹

In short, there is no such thing as a "presumption of arbitrability" which negates the decision of the instant bargaining parties to allow self-help by employees in safety disputes. Petitioner's suggestion runs counter to the holding of *Warrior & Gulf* and to the uniform practice of the lower courts in administering *Warrior & Gulf*.⁶⁰ "[A]rbitration is a matter of contract," *id.* at 582, and "[t]he parties are free to make that promise [to submit disputes to arbitration] as broad or as narrow as they wish. . . ." *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 570 (1960) (Brennan, J., concurring). *Accord*, *John Wiley & Sons v. Livingston*, 376 U.S. 543, 547 (1964); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962). As a matter of fact, collective bargaining agreements often limit the arbitration duty by excluding certain classes of disputes—sometimes such limitations are sought by the employer, in order to avoid the restraints which an inventive arbitrator might impose on managerial freedom of action;⁶¹ sometimes such limitations are sought by the union in order to pre-

⁵⁹ The very statement of the "presumption" in *Warrior & Gulf* makes this clear. See 363 U.S. at 581.

⁶⁰ For cases denying a union's request that the employer be ordered to arbitrate, on the ground that the dispute in question is excluded from the arbitration duty, see *Halstead & Mitchell Co. v. United Steelworkers*, 421 F.2d 1191 (C.A. 3, 1969); *General Tel. Co. v. Communications Workers*, 402 F.2d 255 (C.A. 9, 1968); *District 50, UMWA v. Chris-Craft Corp.*, 385 F.2d 946 (C.A. 6, 1967); *United Aircraft Corp. v. Lodge 971, IAM*, 360 F.2d 150 (C.A. 5, 1966); *Communications Workers v. New York Tel. Co.*, 327 F.2d 94 (C.A. 2, 1964); *cf. United Steelworkers v. General Fireproof Co.*, 464 F.2d 726 (C.A. 6, 1972).

⁶¹ See the preceding footnote.

serve the right to engage in concerted action.⁶² See generally Bureau of Labor Statistics, *Arbitration Procedures* (U.S. DOL Bulletin No. 1425-6, 1966).

"A total of 348 agreements, covering 2.2 million workers, identified one or more dispute issues as nonarbitrable. . . . It seems reasonable to assume . . . that *underlying many exclusions was a strongly held belief of one or both parties that the issue in question was too important or too subtle to be entrusted to a decision of a third party.*"

Id. at p. 11 (emphasis added).

In any event, the duty of a Section 301 court is to enforce the parties' bargain, including exclusions from arbitration and reservations of self-help as well as the duty to arbitrate in a proper case.

A second objection to petitioner's invocation of the "presumption" runs even deeper. *Warrior & Gulf* and the other cases cited so far are Section 301 suits by one of the bargaining parties (usually the union) to compel the other to submit a particular dispute to arbitration. In that setting the "pro-arbitration policy" of federal labor legislation is not offset by any countervailing statutory policy; if the court takes an overzealous view of arbitrability the only harmful result is the slight cost and vexation of proceeding with arbitration in the time it takes for the arbitrator

⁶² See *NLRB v. Deaton Truck Line, Inc.*, 389 F.2d 163, 169 (C.A. 5, 1968) ("If it has not been agreed that arbitration is the exclusive method of settling the dispute in question, a strike is not in breach of the contract"); *United Brotherhood of Carpenters & Joiners v. Hensel Phelps Constr. Co.*, 376 F.2d 731, 737 (C.A. 10, 1967) ("A failure to agree that disputes shall be resolved by binding arbitration permits the parties to resort to other remedies such as work stoppages"), *cert. denied*, 389 U.S. 952.

to reject the grievance. But the present case involves a suit for a *Boys Markets* injunction to restrain concerted employee activity, and mistaken judicial interference in this context inevitably offends the vital federal policy embodied in the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, *et seq.*⁶³

The entire tenor of petitioner's argument runs counter to the policies of the Norris-LaGuardia Act, whose purpose was to curb the abuse of the labor injunction that had done so much to sully the federal courts.⁶⁴ Petitioner proposes that the courts should resume the practice of "free wheeling judicial interference in labor relations" that the Act condemns. *Chicago & N.W. R. Co. v. United Transportation Union*, 402 U.S. 570, 583 (1971). Petitioner completely ignores the specific contractual right of self-help exercised by the Gateway miners, and instead seeks to bury the contract under a "presumption" piled on top of an "implication," the interment to take place in summary preliminary injunction proceedings without full airing of facts and law. Petitioner well knows that once an anti-strike injunction is issued, the employees' cause has been defeated even if the restraint be er-

⁶³ Sections 1 and 4 of the Act, 29 U.S.C. §§101 & 104, deprive the federal courts of jurisdiction to enjoin the peaceable concerted activities of employees. Sections 6 through 12, 29 U.S.C. §§ 106-112, impose an elaborate system of procedural safeguards to prevent abuse of the labor injunction.

⁶⁴ See generally F. Frankfurter & N. Greene, *The Labor Injunction* (1930); A. Cox & D. Bok, *Cases and Materials on Labor Law* 96-97 (1965). See also *Order of R. R. Telegraphers v. Chicago & N. W. Ry. Co.*, 362 U.S. 330 (1960); *United States v. Hutcheson*, 312 U.S. 219 (1941); *Milk Wagon Drivers Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940).

roneous and later lifted.⁶⁵ In particular, petitioner's heedless "presumption" means that strikes may be broken by the courts in the name of arbitration, even in cases where the parties never in fact agreed to arbitrate the underlying dispute, leaving the employer with a windfall victory.⁶⁶ This is nothing short of a proposal to turn the federal judiciary into an injunction-granting machine, and would seem to be fully answered by Justice Brandeis' protest of fifty years ago: "it is not for judges . . . to set the limits of permissible contest" in labor disputes. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488 (1921) (dissenting opinion).

Of course this Court in *Boys Markets* held that anti-strike injunctions may issue despite Norris-LaGuardia in order to enforce "the obligation that the union freely undertook" to submit to arbitration in lieu of self-help. 398 U.S. at 252. That holding flows from the need to "accommodate" and "reconcile" Norris-LaGuardia and Section 301, *id.* at 251, and the accommodation of *Boys Markets* is such that "the core pur-

⁶⁵ See Aaron, *Labor Injunctions in the State Courts—Part II*, 50 Va. L. Rev. 1147, 1157-58 (1964); 7 *Moore's Federal Practice*, ¶ 65.04[3].

"The injunctions might later be dissolved, but in the meantime strikes would be crippled because the occasion on which concerted activity might have been effective had passed. . . . Respect for the courts and the judicial process was not increased by the history of the labor injunction."

Walker v. City of Birmingham, 388 U.S. 307, 331 (1967) (Warren, C. J., dissenting).

⁶⁶ See Note, *Labor Injunctions, Boys Markets, and The Presumption of Arbitrability*, 85 Harv. L. Rev. 636, 639-42 (1972).

pose of the Norris-LaGuardia Act is not sacrificed. . . ." *Id.* at 253.⁶⁷

"Our holding in the present case is a narrow one. We do not undermine the vitality of the Norris-LaGuardia Act."

Id. The "core purpose" of the Act was and is to curb abuse of the labor injunction, to avoid free-wheeling judicial interference with the right of employee self-help. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 458 (1957). *Boys Markets* pays heed to that purpose by requiring the federal courts to take care in scrutinizing the contractual agreement of the bargaining parties, to see whether the union did or did not "freely undertake" to forbear from self-help.⁶⁸

Judicial caution is necessary in order to maintain the careful balance of conflicting congressional policies struck in *Boys Markets*. Petitioner would have the federal courts throw caution to the winds, apparently in the view that the Norris-LaGuardia Act is now a dead letter. Perhaps it is enough to say that no Court of Appeals has been so faithless to the admonitions of

⁶⁷ See *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 223 (1962) (dissenting opinion adopted by the Courts in *Boys Markets*): "Congress, clearly, had no intention of abandoning wholesale the Norris-LaGuardia policies in contract suits." See also Remarks of Senator Taft, 93 Cong. Rec. 6445-46 (80th Cong., 1st Sess., June 5, 1947). See generally Note, *Accommodation of the Norris-LaGuardia Act to Other Federal Statutes*, 72 Harv. L. Rev. 354 (1958).

⁶⁸ "A District Court entertaining an action under § 301 may not grant injunctive relief against concerted activity unless and until it decides that the case is one in which an injunction would be appropriate despite the Norris-LaGuardia Act. When a strike is sought to be enjoined because it is over a grievance which both parties are contractually bound to arbitrate, the District Court may issue no injunctive order until it first holds that the contract *does* have that effect."

Id. at 254 (emphasis in original) (adopting language of the dissenting opinion in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

Boys Markets or to the command of Norris-LaGuardia as to ignore an express contractual reservation of the right of employees to engage in concerted activities. Reservations of self-help are part of the bargain that a *Boys Markets* court sits to enforce;⁶⁹ they are not overriden by any "presumption" or "implication" or other variety of judicial fiat; and they are, in fact, routinely honored by the federal courts.⁷⁰ The proper judicial approach, when a union sets up a contractual reservation of self-help, is articulated by the Second Circuit in the leading case on this topic, *Standard Food Products Corp. v. Brandenburg*, 436 F.2d 964, 966 (C.A. 2, 1970):

"Where the collective agreement, as here, excepts from the requirement of arbitration certain types of contract violations and provides that the union retains the right to strike with respect to such [employer] violations, no injunction can issue against a strike where the union presents a colorable claim that such violations have occurred. The trial judge to whom in these circumstances an application for an injunction is made has no power to decide the merits of the controversy. The parties have agreed that such a controversy is to be left to the arbitrament of economic weapons."

⁶⁹ American labor contracts articulate such reservations in a variety of ways: They may appear in no-strike and arbitration clauses themselves, elsewhere in the body of the main agreement, or in collateral agreements. See *Warrior & Gulf*, 363 U.S. at 579, n. 5, and 584. See generally Bureau of Labor Statistics, *Arbitration Statistics* (U. S. DOL Bulletin No. 1425-6, 1966).

⁷⁰ See, e.g., *Martin Hageland, Inc. v. United States Dist. Co.*, 460 F.2d 789, 791 (C.A. 9, 1972) ("Federal courts have no jurisdiction to order the union to forego the remedy it received at the bargaining table"); *Association of Gen. Contrs. v. Illinois Confer. of Teamsters*, 454 F.2d 1324 (C.A. 7, 1972); *Morning Telegraph v. Powers*, 450 F.2d 97 (C.A. 2, 1971), cert. denied, 405 U.S. 934 (1972); cf. *McCord, Condrion & McDonald, Inc. v. Carpenters Local 1822*, 464 F.2d 1036 (C.A. 5, 1972).

III. CONTRACTUAL RETENTION OF THE RIGHT TO ENGAGE IN SAFETY STOPPAGES IS IN LINE WITH PUBLIC POLICY.

Respondents' fundamental insistence is that this is a contract case, calling for the purposive construction and application of a particular bargaining agreement. The contractual provision at the heart of the case pertains specifically to safety disputes, but it is not strictly necessary for this Court to consider the special congressional policies in the area of job safety in order to affirm the right of the Gateway miners to engage in self-help. Of course, job safety is a mandatory subject of bargaining between union and management,⁷¹ and at the present time it happens that "clauses, protecting safety or health walkout[s] under allegedly abnormal conditions, are being sought by more and more unions."⁷² Such bargains, when struck, must be honored by the courts under the most elementary notions of Section 301 laws.

Nonetheless, a brief inquiry into the policies of federal job safety legislation is in order. For if contract interpretation may be aided by an understanding of public policy, as petitioner would concede, then surely all of the policies that bear on a given case should be considered. And the fact is that at least three congressional enactments affirmatively support and

⁷¹ See *NLRB v. Gulf Power Co.*, 384 F.2d 822 (C.A. 5, 1967); cf. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring).

⁷² Bureau of National Affairs, *OSHA and the Unions: Bargaining on Job Safety & Health* at 35 (1973).

"Chairman Robert D. Moran of the OSHA Review Commission . . . predicted that more 'imminent danger clauses would be appearing in labor-management contracts.'"

...
"In pressing for 'imminent danger' clauses, the unions seek to go beyond statutory guarantees."

lend the weight of strong public policy to the miners' contractual retention of the right to stop work in safety disputes.

A. EMPLOYEE SELF-HELP IN SAFETY DISPUTES COMPORTS WITH THE POLICY OF THE COAL MINE HEALTH AND SAFETY ACT OF 1969, THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, AND SECTION 502 OF THE TAFT-HARTLEY ACT.

1. The Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq.

The chronology of federal coal mine safety legislation follows the calendar of major mine disasters: enactments came in 1947, the year of Centralia; in 1952, after the West Frankfort disaster set the modern record for lives lost; and in 1969, after 78 miners died in the explosion of Consolidation Coal's No. 9 Mine at Farmington, West Virginia.⁷³ Coal mining remains the most hazardous industry in America,⁷⁴ and it is virtually a truism that, as the preamble to the 1969 enactment says,

"There is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm. . . ."

30 U.S.C. § 801 (c).

The coal miners' retention of the right to engage in safety stoppages is just such a "means . . . to prevent death and serious physical harm." The committees of Congress that drafted the 1969 legislation were fully aware both of the vital role the union must play in

⁷³ See House Committee on Education and Labor, *Legislative History, Federal Coal Mine Health and Safety Act* (1970) at 4-6 (S. Rept. No. 91-411 on S. 2917, 91st Cong., 1st Sess.); *id.* at 559-560 (H.R. Rep. No. 91-563 on H.R. 13950, 91st Cong., 1st Sess.).

⁷⁴ Bureau of Labor Statistics, *Injury Rates by Industry, 1970*, at 4 (Report No. 406, 1972).

obtaining mine safety enforcement, and of the specific contractual provision that accords a right of self-help in safety disputes.⁷⁵ Senate oversight hearings conducted in 1970 focused closely on the role of the UMWA Safety Committees in enforcing coal mine safety.⁷⁶ Significantly, at the time of the 1970 Hearings the enforcement performance of the U.S. Bureau of Mines was judged by Senator Harrison Williams, principal author of the 1969 Act, to be "outrageous . . . just plain unbelievable."⁷⁷

There is little need to belabor the point that the contractual right to engage in safety stoppages is in

⁷⁵ See, e.g., *Hearings on S. 355, etc., Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 1st Sess., pt. 1, at 466 (1969) (testimony of former UMWA President Boyle):

" . . . the operators vigorously opposed that section of the contract, but it is in there now and it is effective. . . . If there is imminent danger existing then the committee is empowered to withdraw those men from that hazardous area until such time as it is corrected."

Both the contractual right and the problem of employer reprisals against miners who invoke it were discussed at the Senate hearings. See *id.* at 466-67; *id.*, pt. 2, at 791 (testimony of UMWA safety committeeman Wolford).

⁷⁶ See *Hearings on Health and Safety in the Coal Mines Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 91st Cong., 2d Sess. (1970), at 23 (testimony of Gateway safety committeeman Ozonish), 26-27 (testimony of Gateway safety committeeman Price), 353-54 (colloquy initiated by Senator Schweiker's comment that "under the present contract your mine safety committee of three members can shut down a mine if it is unsafe").

Safety problems at the Gateway mine figured prominently in the 1970 oversight hearings. See, e.g., *Hearings, supra*, at 4-22 (official reports of safety violations at Gateway). Gateway miners testified specifically concerning the negligence of supervisors in safety matters, *id.* at 351, and, remarkably, complained of the practice of "not testing for gas." *Id.* at 27. This testimony was given almost a year before the Gateway stoppage that gave rise to the present case.

⁷⁷ *Senate Hearings, supra*, at 191.

line with the congressional policy embodied in the 1969 Act, which begins with the declaration that

“The first priority and concern of all in the coal mining industry must be the health and safety of its most precious resource—the miner. . . .”

30 U.S.C. § 801(a). Petitioner’s suggestion that the contractual right to self-help is undercut by the existence of governmental safety enforcement powers is nonsense. From the beginning in 1946, through the period of congressional activity in 1969 and thereafter, the contractual role of the miners in enforcing safety has been recognized as a necessary supplement to governmental enforcement.⁷⁸ The union of coal miners would be a sorry operation indeed if it came to rely solely on federal officials for enforcement of mine safety.⁷⁹ Today the U.S. Bureau of Mines, in con-

⁷⁸ Petitioner suggests that there is no longer a need for safety stoppages in light of the fact that federal mine inspectors, under the 1969 Act, are empowered to close mines in cases of imminent danger. See Petr. Brief at 21. Perhaps petitioner is unaware that the worst disaster since Farmington (Hyden, Kentucky, December 30, 1970, 38 dead) could have been prevented had federal inspectors used these powers, but they did not. *Report of General Subcomm. on Labor of the House Comm. on Education and Labor, Investigation of the Hyden, Kentucky, Coal Mine Disaster*, 92d Cong., 1st Sess., at xi-xii (1971). The Report states that “[m]any of the miners killed looked hopefully but vainly to the Bureau for closure. . . .” *Id.* at XIII. They had to look to the U. S. Bureau of Mines because Hyden mine was nonunion. See *id.* at 78.

⁷⁹ To put the matter mildly, the U. S. Bureau of Mines has been criticized for lack of vigor in enforcing the 1969 Act. See, e.g., GAO Report to the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare (No. B-170686, May 13, 1971) (problems in implementing the 1969 Act); GAO Report to the Subcomm. on Conservation and Natural Resources of the House Comm. on Govt. Operations (No. B-170686, July 5, 1972) (problems in assessment and collection of penalties under the 1969 Act). Recently the Bureau’s scheme for assessing penalties for safety violations—the very heart of enforcement—was struck down. *National Indep. Coal Operator’s Assn. v. Morton*, 357 F. Supp. 509 (D.D.C., 1973).

nection with Pennsylvania State University, is conducting a special training program for all UMW local safety committeemen,⁸⁰ plainly in recognition of the need for what Krug called "the minute-by-minute vigilance" of the miners themselves.

2. The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq.

The 1970 legislation (OSHA) is not directed to the particular problems of bituminous coal miners, but like the 1969 enactment it evinces a strong congressional concern to accomplish effective enforcement of job safety and diminution of "personal injuries and illnesses arising out of work situations," which result in death or disability. 29 U.S.C. § 651.⁸¹ The OSHA has been interpreted by the agency responsible for its enforcement, the Department of Labor, as creating a right of employee self-help in the face of hazardous work conditions which exists entirely independently of other statutes and bargaining agreements.⁸² This

⁸⁰ Contract No. S0133019, "Special Health and Safety Seminars for Authorized Representatives of Miners," U. S. Bureau of Mines, Branch of Contracts and Grants. Such training efforts began in 1946. See note 31, *supra*. See also *Senate Hearings on Health and Safety in the Coal Mines*, *supra* note 76, at 31 ff.

⁸¹ "The problem of assuring safe and healthful work places for our working men and women ranks in importance with any that engages the national attention today." Senate Comm. on Education and Labor, *Legislative History of the Occupational Safety and Health Act of 1970* (1971) at 2 (S. Rept. No. 91-1282 on S. 2193, 91st Cong., 2d Sess.).

⁸² 38 Fed. Reg. 2681-83 (Jan. 29, 1973) (amendment to 29 C.F.R. pt. 1977, pursuant to § 8(g)(2) of OSHA, 29 U.S.C. § 657(g)(2) :

§ 1977.12. Exercise of any right afforded by the Act.

"(b)(2) However, occasions might arise when an employee is confronted with a choice between performing

fact alone belies petitioner's suggestion that the OSHA draftsmen intended to discourage employee self-help or doubted its utility and rationale.⁸³ In fact, the passage of OSHA has helped to spur collective bargaining on questions of job safety: The Chairman of the OSHA Review Commission has predicted that more "imminent danger clauses would be appearing in labor-management contracts," clauses going beyond both OSHA and Section 502 of the Taft-Hartley Act. Bureau of National Affairs, *OSHA and the Unions: Bargaining on Job Safety & Health* at 35 (1973).

3. Section 502 of the Taft-Hartley Act, 29 U.S.C. § 143.

This provision is the third repository of congressional policy that supports employee retention of the contractual right to engage in safety stoppages.

Section 502, *in pari materia* with Section 301 of Taft-Hartley, provides that "the quitting of labor by . . . employees in good faith because of abnormally dangerous conditions for work" shall not "be deemed a

assigned tasks or subjecting himself to serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the dangerous condition, he would be protected against subsequent discrimination. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, a correction of the dangerous condition."

⁸³ The "legislative history" cited by petitioner is completely beside the point. It all pertains to a rejected House provision that would have allowed stoppages "with full pay" (see Petr. Brief at 22) to protest specific employer violations.

strike under this Act.”⁸⁴ The provision reflects a congressional judgment that “[a] protest against unsafe working conditions, specifically protected by the Act, is as vital a union activity as a strike in support of bargaining activities.” *NLRB v. Great A & P Tea Co.*, 340 F.2d 690, 696 (C.A. 2, 1965). A Section 502 walkout is concerted activity protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157. Even in the face of an express no-strike clause making no exception whatever for safety disputes, a stoppage in good faith because of abnormally dangerous conditions can neither be enjoined nor penalized in any other fashion. See, e.g., *Philadelphia Marine Trade Assn. v. NLRB*, 330 F.2d 492 (C.A. 3, 1964), *cert. denied*, 379 U.S. 833 & 841; *NLRB v. Knight Morley Corp.*, 251 F.2d 753 (C.A. 6, 1957), *cert. denied*, 357 U.S. 927 (1958).

It is important that the place of Section 502 in the argument before this Court be carefully outlined, since petitioner devotes two argument headings to an imaginary contest about the independent force of the provision. This is a contract case, not a Section 502 case; the right of the Gateway miners to stop work, upheld by the court below, is a contractual right. Since the present agreement does not forbid self-help in safety disputes, the question of Section 502's independent application does not arise.⁸⁵

Respondents point to Section 502, as well as the Coal Mine Health and Safety Act and OSHA, for the

⁸⁴ For legislative background of the provision see S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., at 30 (1947); *Knight Morley Corp.*, 116 NLRB 140, 146, 38 LRRM 1194, 1195 (1956), *enf'd.*, 251 F.2d 753 (C.A. 6, 1957), *cert. denied*, 357 U.S. 927 (1958).

⁸⁵ That the Court of Appeals held for respondents on contractual, not statutory grounds, is made perfectly plain in Judge Hastie's opinion. See App. C at p. 18a.

limited purpose of showing that the contractual right of miners to engage in safety stoppages comports with congressional policy. The object of Section 502 is "to protect the right of employees to quit their labor without penalty in order to protect their health and their lives," *Knight Morley Corp.*, 116 NLRB 140, 146, 38 LRRM 1194, 1195 (1956), *enf'd, supra*, and that is certainly a relevant fact for a court to consider in construing the present agreement. The Court of Appeals viewed Section 502 as expressive of pertinent "public policy" (App. C at 17a), since naturally contracts should be construed in line with public policy when that is reasonable.

It follows that petitioner is mistaken in saying that the Court of Appeals opted for a "subjective" rather than an "objective" test in Section 502 litigation. The Court of Appeals had no occasion to opt either way. First—and to repeat—the privilege accorded safety walkouts by the lower court is a contractual privilege, not one founded in federal statutory law. The miners' good faith apprehensions govern this case because the contract says so. The scope of the contractual privilege is a matter for collective bargaining. Second, this is not a case in which the miners acted out of a purely "subjective," unsupportable whim or caprice. The record contains a multitude of "objective" facts which give rise to the miners' intense, honest, reasonable, good faith fear for their own safety and to their willingness to forego their pay rather than submit to working conditions they rightly regarded as intolerable.⁸⁶

⁸⁶ Among the "objective" facts noted by the court below are the foremen's failure to carry out safety procedures; their criminal prosecution for falsification of safety records, and their *nolo* pleas; prior complaints about their unsafe practices; the emergency condition that resulted from their willful misconduct in the present

B. THE COURT OF APPEALS QUITE RIGHTLY CONSIDERED THE SPECIAL FEATURES OF SAFETY DISPUTES IN CONSTRUING THE PRESENT AGREEMENT.

Contrary to the broad assertions of petitioner's first two argument headings, the Court of Appeals did not set up any inflexible, mechanical rule barring *Boys Markets* injunctions in all safety stoppages regardless of the contractual setting. What the lower court did was simply to consider certain features of safety disputes which do, in a just sense, render them "*sui generis*."

The normal contract grievance concerns a dispute over an economic issue (wages, hours, work assignment, seniority, vacations, and so on). When the bargaining agreement gives up the right to stop work, there is no special justification for employees not to continue on the job and submit to the disputed condition while the underlying economic issue is resolved through the grievance and arbitration process. Self-help in the ordinary situation is, like arbitration, a means of resolving the particular dispute; the purpose of self-help is to induce resolution favorable to the strikers. The only harm from submitting to the disputed condition pending arbitration would be economic and compensable by an arbitral award.

But of course every situation is not the normal one. For example, when an employer engages in a campaign of unfair labor practices, or systematically disregards the agreement and manufactures disputes to undermine the union, a threat to the very integrity of the bargaining relation exists. This Court has recognized that employee self-help has a special justifica-

case; and Gateway's failure to take corrective steps. For a fuller account see Counterstatement of the Case, *supra*.

In the Court of Appeals respondents argued that the present stoppage comes well within the Section 502 test used by the NLRB, which requires that the good faith apprehensions of employees have some reasonable basis.

tion in such situations and is permissible even in the face of an express and unqualified no-strike promise. See, e.g., *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). See also *NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957).

A safety stoppage is likewise not the typical case. The costs of submitting to the disputed condition are quite different than in the normal economic case—they may include life and limb. A safety stoppage is not an act of economic warfare to induce a favorable economic outcome, but is an act of concerted self-preservation and self-protection. This fact is recognized in Section 502, which operates even in the face of an express no-strike clause. Public policy, not to mention good sense, does not require submission to hazardous working conditions while an arbitrator's decision is awaited.⁸⁷ Indeed, arbitrators themselves routinely prohibit discharge or disciplining of employees who refuse to submit to hazardous conditions—and the test used in these cases, as a matter of arbitral “common law,” looks to good faith on the part of the employees.⁸⁸

Thus an arbitration clause by itself simply is not “‘instinct with an obligation,’ imperfectly expressed,” *Wood v. Lucy*, 222 N.Y. 88, 118 N.E. 214 (1917)

⁸⁷ See generally 41 *Cincinnati L. Rev.* 943 (1972) (case comment on decision below).

⁸⁸ See, e.g., *Tremco Mfg. Co.*, 72-1 CCH Arb. ¶ 8292, 4006; *Rohr Corp.* 71-2 CCH Arb. ¶ 8529, 4960; *Morton Salt Co.*, 70-2 CCH Arb. ¶ 8462, 4519; *Ohio Edison Co.*, 70-2 CCH Arb. ¶ 8445, 4457; *U. S. Steel Corp.*, 70-2 CCH Arb. ¶ 8708, 5335; *A. M. Castle & Co.*, 64-1 CCH Arb. ¶ 8102, 3348; *La Clede Gas Co.*, 39 Lab. Arb. 833 (1962). The intellectual foundation of these decisions is the arbitral opinion of the late Dean Harry Shulman in *Ford Motor Co.*, 3 Lab. Arb. 779 (1944). Dean Shulman explains why it is normally fair to ask employee obedience to a disputed order or practice pending grievance discussions, while making clear that obedience is not to be exacted when it involves “an unusual health hazard or other serious sacrifice.” *Id.* at 780, 782.

(Cardozo, J.), to refrain from self-help in safety disputes.

The Court of Appeals quite properly brought these considerations to bear on the instant case. Here, after all, there is no express no-strike undertaking whatever—the contract affirmatively disavows any such duty. Here the arbitration clause is the only basis for implying a duty to refrain from self-help and submit to disputed conditions, and certainly any no-strike implication, if warranted at all,⁸⁹ should not extend to safety stoppages, where submission involves jeopardy of life and limb. The federal labor policy discussed in the last several pages requires that labor agreements not be construed to forfeit employee's right to stop work over safety disputes, in the absence of any express contractual no-strike duty. There is nothing in *Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962), suggesting an opposite approach: *Lucas Flour* speaks to the ordinary situation in which arbitration is "a substitute for economic warfare." *Id.* at 105. The Court of Appeals' unwillingness to imply a duty to submit to hazardous conditions is understandable on this ground alone, though of course a no-strike implication as to safety disputes is completely negated in any event by the express contractual reservation of self-help in safety disputes.

Close attention to relevant public policy is an essential judicial duty in *Boys Markets* cases. The substantive law in all Section 301 cases must be drawn "from the policy of our national labor laws," *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957), and decisions rendered "according to the precepts of federal labor policy." *Lucas Flour*, 369 U.S. at

⁸⁹ See n. 10, *supra*.

103. “[C]onsideration must be given to the total corpus of pertinent law and . . . policies. . . .” *Boys Markets*, 398 U.S. at 250. See also *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 548-50 (1964).

Here the petitioner has pointed to but one of many relevant, sometimes competing policies—the policy favoring peaceable settlement through arbitration of normal contract grievances of an economic nature. Sound analysis shows that this undoubted policy is attenuated in the safety context. Moreover, that policy is met in the present case by strong countervailing policies, among them (a) the anti-injunction policy of *Norris-LaGuardia*, requiring cautious administration of the labor injunction; (b) the policy of Section 502, of the OSHA, and of the common law of arbitration, favoring employee self-help in the face of hazardous working conditions; and (c) the emphatic policy of the Coal Mine Health and Safety Act of 1969, and predecessor legislation, favoring effective enforcement of mine safety by the miners themselves.

The focal point of this case, on which all relevant federal policies converge, is the express contractual reservation of self-help by coal miners in safety disputes. That provision plainly builds upon and advances the affirmative policies of the law. The duty of a *Boys Markets* court, in sum, is to honor that contractual choice and give it “full play.” *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566 (1960).

CONCLUSION

According to petitioner, the path of decision herein is marked by a “presumption” drawn from *Warrior & Gulf*, an “implication” on the authority of *Lucas Flour*, and by *Boys Markets*’ “accommodation” of

Norris-LaGuardia rights. The end result sought is nullification of coal miners' historic contractual right not to submit to intolerable jeopardy of life and limb. Such logic invites quotation of the recent admonition of the Chief Justice in *United States v. 12 200-Ft. Reels*, 41 USLW 4961, 4962 (1973):

"The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth or fifth 'logical' extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the 'line-drawing' familiar in the judicial, as in the legislative process: 'thus far but not beyond.'"

In *Boys Markets* itself, the Court cautioned against the granting of anti-strike injunctions "as a matter of course in every case." 398 U.S. at 254. Respondents submit that in this case, the line that marks the limit of intervention must be drawn.

For the reasons stated, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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